

Service Date: March 6, 1997

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER of the Application of)	
U S WEST Communications, Inc. to)	UTILITY DIVISION
Discontinue Centrex Plus Service,)	
)	DOCKET NO. D96.2.15
and)	
)	
IN THE MATTER of the Application of)	
PTI Communications to Discontinue)	ORDER NO. 5905c
Digitrex II Service.)	

FINAL ORDER

Introduction and Procedural Background

1. On February 5, 1996 U S WEST Communications, Inc. (U S WEST) filed an application with the Montana Public Service Commission (Commission), proposing to discontinue offering its Centrex Plus service to new customers and to grandfather existing customers until April 29, 2005. U S WEST proposed to honor the term for existing contracts and to permit contract extensions until April 29, 2005. Existing Centrex Plus customers would be able to move, add and change station lines until the customer moves to another service, the contract expires, or April 29, 2005. The filing also contains certain restrictions for existing customers, some specific to customers subscribing to Centrex Plus service on a month-to-month basis and customers subscribing to other centrex-like services.

2. U S WEST's Centrex Plus filing generated protests from MCI Telecommunications Corporation (MCI), the Telemanagement Coalition (Coalition)¹ and AT&T Communications of the Mountain States, Inc. (AT&T). These objections alleged that the filing is anticompetitive, discriminatory, in violation of state and federal law, and inconsistent with the public interest.

3. Pursuant to § 69-3-810(4), MCA, ARM 38.5.2760(4) and the objections, the Commission suspended withdrawal of Centrex Plus service and issued a Notice of Opportunity to Comment and/or Intervene. The Commission established this proceeding to investigate the public interest impacts of discontinuing Centrex Plus service and to evaluate U S WEST's pro-

¹ The Coalition did not subsequently petition to intervene in this proceeding.

AT&T requested stricken from the record was not yet a part of the record, not having been formally introduced at hearing, and ruling that AT&T could renew its objection to portions of the testimony when the testimony became part of the record.

7. Pursuant to requests from the parties, the initial hearing date was vacated and rescheduled for September 18, 1996. On September 12, 1996 U S WEST filed a motion for an order deeming this matter submitted to the Commission upon a stipulated record, for briefing by the parties. The stipulated record (by MCC and the active parties in this proceeding, U S WEST, AT&T, PTI and MCI) includes the testimony of the parties' witnesses without their appearance or cross-examination, subject to the pending motion of AT&T to strike portions of Ms. Baird's prefiled testimony. The Commission granted U S WEST's motion on September 17, 1996, ordering that it would decide the issues based on the prefiled testimony, written discovery and other information officially noted according to Montana law. The Commission also vacated the remainder of the Procedural Schedule, established a briefing schedule and scheduled oral argument for November 1, 1996. The oral argument was postponed and subsequently canceled upon Commission determination that it was not needed to decide the issues in this proceeding.

Summary of the Arguments

8. U S WEST and PTI assert that their existing Centrex Plus and Digitrex II³ price structures are susceptible to price arbitrage if new entrants are allowed to resell centrex in competition with basic business exchange service. They claim this arbitrage would inappropriately remove revenue contributions that support universal service. They also state that the centrex price structure is based on certain cost characteristics that may not apply to the broader basic business market and that centrex revenues may not continue to cover costs if the service is resold as single line business service.

9. In their Joint Briefs, AT&T and MCI state that withdrawing centrex service is anticompetitive because it eliminates an economically feasible way for new entrants to begin offering local service. They also claim that centrex withdrawal is inconsistent with the 1996 Act which requires incumbent LECs to allow the resale of their retail services. They suggest that requiring the LECs to resell centrex will contribute to a competitive local exchange market in Montana and will benefit end users.

AT&T's Motion to Strike U S WEST Testimony

10. In the Joint Opening Brief of AT&T and MCI, AT&T reasserted its motion to strike portions of Ms. Baird's testimony. AT&T has claimed that it issued data requests to U S

³ Collectively referred to as "centrex" in this order.

determine whether such assertions are supported by substantial evidence. It is not necessary to strike portions of the record to remove them from Commission consideration. Unlike a jury convened to determine a verdict, the Commission is an administrative body with specialized knowledge relating to the issues in this Docket. Section 2-4-612(7), MCA, states that an agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. AT&T urges the Commission to eliminate "unsupported conjecture" from the record. This would be a waste of Commission resources if the Commission elected to excise such testimony rather than giving it the weight it deserves at the time of decision. Moreover, most parties to proceedings before the Commission are well used to presenting their cases and legal arguments to the Commission and have ample opportunity to argue that little weight should be given to conclusory and unsupported evidence.

15. AT&T's motion essentially argues that Ms. Baird's testimony, without the underlying cost data to support it, fails to convincingly explain the potential for damage to universal service and the public interest generally. This argument is appropriately addressed in briefs. Although AT&T urges the Commission to exclude this evidence, it has made no reference to the Montana Rules of Evidence in support of its contentions. AT&T's motion to strike is denied.

Summary of the Testimony

U S WEST - Prefiled Direct Testimony

16. Ms. Karen A. Baird prefiled direct testimony on behalf of U S WEST, giving two reasons for Centrex Plus withdrawal: 1) to address price arbitrage concerns, and 2) to focus its resources on developing a replacement for Centrex Plus.

17. Ms. Baird testified that existing price differences between Centrex Plus and basic business service, combined with industry changes prompted by the 1996 Act, create arbitrage opportunities that should be addressed. An exhibit attached to her testimony indicates that the average revenue produced from a basic business access line exceeds the revenue that would be produced if that access line were converted to a resold Centrex Plus line.

18. Ms. Baird further testified that U S WEST believes that centrex resale would cause losses of intraLATA toll and switched access revenues as resellers aggregate end-user toll traffic and bypass U S WEST's system. Ms. Baird stated that lost revenues from basic business, toll and switched access services would reduce the contributions currently available to support lower residential rates and could harm universal service in Montana.

19. U S WEST contends that discontinuing centrex will not affect AT&T, MCI, McLeod or the Coalition since none of these entities currently subscribe to centrex service in

medium and large businesses in urban locations with high line concentrations -- this may not be true if Digitrex II must be provided to small, single line business customers through resellers. Mr. Otis explained that Digitrex II pricing takes advantage of certain economies involved with serving medium and large business customers which may not be available with small business customers. Thus, in a resale scenario, existing Digitrex II prices could be less than cost.

AT&T - Prefiled Direct Testimony

25. Mr. John Blake, testifying on behalf of AT&T, asserted that U S WEST and PTI's requests to discontinue centrex services are anticompetitive because their withdrawal will impede the development of competition in Montana and are inconsistent with federal and state policies. According to Mr. Blake, centrex service is nothing more than a local loop combined with certain central office switching functions that have been grouped for sale on a discounted basis. He asserted that centrex offers the transmission and facilities needed to connect end users to the local network and LECs remain monopoly providers of these basic network functions and features. AT&T believes that discontinuing centrex-type services raises barriers to entry into local and intraLATA markets and reduces customer choice.

26. AT&T asserted that the 1996 Act requires LECs to make all their retail telecommunications services available for resale and that these requirements apply equally to grandfathered services. AT&T supports the United States Department of Justice's (DOJ) comments in the FCC's Interconnection rulemaking regarding the implementation of §§ 251 and 252 of the 1996 Act, noting that DOJ stated that LECs should not be allowed to avoid the resale requirements of the 1996 Act by withdrawing a retail service. The DOJ also suggested that U S WEST's attempt to withdraw centrex throughout its 14 state region was an effort to avoid having to make the service available for resale.

27. Mr. Blake testified that it is critical that LECs be required to make their entire retail service lines available to new entrants in order to quickly bring the benefits of competition to consumers. He stated that resale provides a starting point for a competitive local exchange market, as experience in the long distance market has shown. He further claimed that centrex resale has contributed to increasing competition in the small and medium business local exchange markets in Iowa, Minnesota, Washington and Oregon.

28. According to Mr. Blake, centrex resale in Montana would benefit both residential and business customers and U S WEST and PTI should not be permitted by this Commission to create barriers to entry by grandfathering centrex service. AT&T also asserted that U S WEST and PTI have not made a reasonable case for grandfathering centrex because it is being used and

service will be unable to satisfy those needs. She contended that U S WEST and PTI are more concerned with protecting their monopoly markets and discouraging competition than in providing the services their customers want and need.

35. Ms. Bennett also testified that the withdrawal proposals violate § 69-3-824, MCA, which concerns consumer protection against unfair business practices and anticompetitive activity. Continuing to provide centrex to certain grandfathered customers while refusing to offer the service to other customers is discriminatory and represents an unfair business practice, according to Ms. Bennett.

36. Ms. Bennett recommended that the Commission either reject U S WEST and PTI's proposals outright, or allow the services to be grandfathered on a retail basis and require U S WEST and PTI to continue to offer the service on a wholesale basis for resale. MCI believes that this will eliminate the anticompetitive aspects of the proposals and ensure the development of competition in Montana.

U S WEST - Rebuttal Testimony

37. In rebuttal testimony, Ms. Baird disagreed that the future of local exchange competition in Montana depends on the ability of new entrants to arbitrage between centrex and basic business service. She stated that new entrants will have ample opportunity to resell other retail products and services. She also testified that AT&T and MCI's assertion that centrex resale is essential for local exchange competition in Montana ignores the facilities-based interconnection requirements of the 1996 Act. In addition, Ms. Baird stated that new entrants will be able to install their own central office switches and will have access to the facilities of other companies.

38. Ms. Baird disagreed that grandfathering centrex is anticompetitive, asserting that U S WEST has the right to request to discontinue a nonessential service at any time. She stated that even in a competitive market there are a number of reasons why a firm would withdraw a product; e.g., insufficient profits, customer migration to other products, a dying market, or abuse or misuse of the product. She reiterated that resale of centrex, given the potential for arbitrage with single line business service, could negatively impact U S WEST's profitability and may negatively impact its Montana customers.

39. Ms. Baird disagreed that grandfathering Centrex Plus is anti-consumer, stating that grandfathering is a common industry practice that treats existing customers reasonably. For potential new customers, functionally equivalent alternatives to centrex exist in the form of PBX systems and key telephone systems. Further, for small business customers, U S WEST still offers Centron I service.

the resale provisions of the FCC's interconnection order and incorporate them into a revised pricing structure.

Findings of Fact and Commission Decision

45. AT&T and MCI refer the Commission to decisions from other states in U S WEST's region which have denied Centrex Plus withdrawal as not being in the public interest or on other grounds. The Commission is not persuaded by these decisions, most of which were rendered prior to the FCC's First Report and Order on August 8, 1996.

46. Centrex is a service that provides business customers with central office-based alternatives to customer owned PBX switching equipment and other on-premise equipment such as key systems. Centrex service allows businesses to create a sub-network of access lines with common access to a variety of system features such as direct inward dialing from and outward dialing to the public switched network, call forwarding, three-way calling, call transfer, call conferencing and call hold. It also provides internal communications within a business entity. Centrex is a competitive central office based substitute for on-premise equipment and is marketed to medium to large business customers as an alternative to premises equipment.

47. Although it appears that Centrex Plus and Digitrex II were not intended for single line business customers, both U S WEST and PTI have expressed their concerns that the scope of potential resale by competitive LECs would include these customers because the station lines can effectively function as a substitute for single line business service. Their concerns relate to the pricing of centrex service, which is considerably less per station line than single line business service. U S WEST and PTI both provided testimony indicating that the cost of centrex is lower than business exchange service due to cost savings realized by extending multiple lines to one or a few locations close to the central office. Exchange service provided to single line customers, on the other hand, is widely dispersed throughout an exchange. Mr. Otis' testimony on behalf of PTI included his calculations indicating that the per line loop cost of serving the dispersed single line customer is five times greater than the average Digitrex II customer. Mr. Otis compared the results of allowing resellers to resell centrex to the results of permitting them to resell residential access lines to business customers.

48. Mr. Otis testified that PTI intends to reprice Digitrex II service in a manner that will be consistent with the 1996 Act and at the same time will not invite adverse impacts on the general body of ratepayers. U S WEST also indicated that it would file tariffs for a Centrex Plus substitute within six to nine months of its initial filing for withdrawal.

based on jurisdictional grounds. It is certainly not relevant to sections where Congress expressly directed the FCC to adopt rules.⁴

52. The FCC Order addressed withdrawal of services by an incumbent LEC, noting that it had sought comment in its interconnection NPRM on whether an incumbent LEC can avoid making a service available at wholesale rates by ceasing to offer the service on a retail basis, or whether it should first be required to demonstrate that withdrawing the offering is in the public interest or that competitors will continue to have an alternative means to provide the service. First Report and Order, ¶ 965. MCI and AT&T apparently rely on comments filed in that docket by the DOJ, one of numerous commenters.

53. The DOJ had argued that unilateral withdrawal should only be allowed if the service is shown to be obsolete. First Report and Order, ¶ 967, fn. 2282. The FCC did not adopt this suggestion and declined to issue general rules on withdrawal of services, concluding that this is better left to the states. For example, the FCC Order concluded that states can better assess the universal service implications of an incumbent LEC's proposal to withdraw a retail service. First Report and Order, ¶ 968.

54. U S WEST's multistate filing of Centrex Plus withdrawal was referred to in the FCC Order. First Report and Order, ¶ 967. The FCC concluded that its general presumption that incumbent LEC restrictions on resale are unreasonable does not apply to incumbent LEC withdrawal of service. First Report and Order, ¶ 968. The FCC further discussed grandfathering of withdrawn services, stating:

We find it important . . . to ensure that grandfathered customers -- subscribers to the service being withdrawn who are allowed by an incumbent LEC to continue purchasing services -- not be denied the benefits of competition. We conclude that, when an incumbent LEC grandfathers its own customers of a withdrawn service, such grandfathering should also extend to reseller end users. For the duration of any grandfathering period, all grandfathered customers should have the right to purchase such grandfathered services either directly from the incumbent LEC or indirectly through a reseller. The incumbent LEC shall offer wholesale rates for such grandfathered services to resellers for the purpose of serving grandfathered customers.

⁴ See Order Granting Stay, slip op. (Th Cir.) (Oct. 15, 1996), *affecting the FCC's pricing and "pick and choose" rules and not the entire Order in Iowa Utilities Board, et al. v. FCC*, No. 96-3321 (and consolidated cases), appealing Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, FCC 96-325 (released Aug. 8, 1996), and see Order Lifting Stay In Part, (8th Cir.) (Nov. 1, 1996), *modifying the stay entered on Oct. 15, 1996, and affecting CMRS and LEC interconnection*.

60. There are two issues related to the U S WEST and PTI's assertions of arbitrage. One is the potential effect on universal service and overall LEC revenues. The other relates to service costs and competition. Neither AT&T nor MCI provided substantial rebuttal of the LECs' arbitrage concerns. MCI's testimony lacks any arbitrage discussion and AT&T merely stated that it does not know what U S WEST and PTI mean by uneconomic or inappropriate arbitrage and that U S WEST and PTI have not claimed that centrex does not cover costs. Despite the apparent lack of interest by AT&T and MCI, the Commission finds that arbitrage issues are important.

61. It is clear from U S WEST and PTI's testimony that they view arbitrage as the potential for centrex resellers to take advantage of the existing rate difference between single line business and centrex services. Both AT&T and MCI suggest that centrex resale would allow them to offer local service to small business customers in competition with the incumbent LECs. These are primarily small business customers who presently subscribe to single line business service. By purchasing centrex service for resale, new entrants could offer these customers the service they are presently subscribing to at lower rates and still profit from reselling the service. Customer migration to a new entrant providing the service at substantially lower rates than the incumbent LEC charges is all but guaranteed.

62. According to U S WEST and PTI, the rates these single line business customers currently pay provide a contribution to universal service by keeping residential rates low. U S WEST and PTI claim that the loss of single line business service revenue that would result from arbitrage could eliminate contributions that help achieve universal service goals.

63. U S WEST and PTI also assert that centrex service was designed to compete with customer premise based equipment such as PBXs and the present pricing structure relies on certain cost characteristics associated with that market. Thus, the cost issue is not whether centrex prices cover existing service costs, as AT&T suggests, but whether it will continue to cover costs in a resale environment where the service is being provided to a market for which it was not designed. The Commission finds these concerns are legitimate and were not adequately discredited by AT&T and MCI.

64. U S WEST and PTI's concerns about lost contributions that support universal service are related to broader questions about overall LEC revenues and rate unbundling and rebalancing that are beyond the scope of this case, but will be considered in other cases. For this reason the Commission sustained certain U S WEST objections to AT&T's discovery which asked for detailed cost and revenue information showing centrex contributions and business service support for lower residential rates. Nevertheless, universal service at affordable rates is a

the past, and both AT&T and MCI declined to indicate when they could offer local service if centrex could be resold more broadly, citing the need for rules on interconnection, unbundling and wholesale rates. Thus, withdrawing centrex on a going-forward basis does not necessarily create a barrier to AT&T's or MCI's entry into local markets and does not foreclose the opportunity to resell centrex to current customers of the service.

69. Price arbitrage opportunities would be created if centrex service were available for resale to single line business customers, given existing prices. Although not empirically verifiable with the data in this case, the record suggests the potential for centrex resale to produce competition based on uneconomic bypass which would not be sustainable. Competition based on these circumstances would be inconsistent with the Montana Telecommunications Act, § 69-3-801, MCA, *et seq.*, which requires an orderly transition to competition.

70. This case raises questions concerning incumbent LECs' present revenues, rate rebalancing and maintaining universal service in more competitive local telecommunications markets. These issues can be better evaluated in more comprehensive cost and revenue proceedings. Absent a thorough evaluation of these issues, permitting broad resale of centrex may unreasonably force LEC's to shed market share and revenues and may not be consistent with the competitive neutrality provisions of the 1996 Act. *See, e.g.*, 47 U.S.C. § 253. For these reasons it is appropriate to allow U S WEST and PTI to withdraw their existing centrex services.

71. AT&T and MCI contend that centrex resale is critical to quickly bring the benefits of competition to consumers. However, centrex resale, or even resale in general, is not the only means by which new entrants will compete with incumbent LECs. Processes are under way to unbundle LEC network elements and functions for resale, other LEC services will be available for resale at wholesale prices, and interconnection arrangements will allow facilities based competition. Even if centrex resale would quickly benefit some consumers by offering lower prices, it is unclear that such benefits would be sustainable or economic.

72. Given the lack of any end-user opposition to the LECs' proposals to withdraw centrex and the availability of facilities based alternatives to centrex service, AT&T's and MCI's assertion that withdrawing centrex is anti-consumer is questionable. The record in this case does not support AT&T and MCI's claims that allowing U S WEST and PTI to withdraw their centrex services will adversely effect the transition to sustainable and economic competition in Montana, or that withdrawal would be anti-consumer.

73. Both PTI and U S WEST have suggested that a restructured centrex service which would be suitable for resale could replace their current services. PTI indicated that restructured centrex may involve price distinctions based on volume, usage and location. Based on the record

cations carriers. *See generally*, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (amending scattered sections of the Communications Act of 1934, 47 U.S.C. §§ 151, *et seq.*). The Montana Public Service Commission is the state agency in Montana charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

6. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

7. The Commission's approval of PTI and U S WEST's applications to withdraw Digitrex II and Centrex Plus, respectively, is not inconsistent with the 1996 Act and FCC regulations adopted on August 8, 1996, to implement the Act, nor does it create a barrier to entry in the Montana telecommunications market. First Report and Order, ¶¶ 965-968.

8. Withdrawal of Digitrex II and Centrex Plus is not contrary to Montana law and is consistent with the public interest and Montana public policy as set forth in § 69-3-802, MCA.

Order

THEREFORE, based upon the foregoing, it is ORDERED that the issues raised in this Docket are resolved as set forth above and as follows:

1. AT&T's Motion to Strike testimony of U S WEST witness Karen A. Baird is denied;
2. U S WEST's application to withdraw Centrex Plus is approved; and
3. PTI's application to withdraw Digitrex II is approved.

DONE AND DATED at Helena, Montana, this 25th day of February, 1997, by a vote of 3-1.

FINAL ORDER NO. 5905c, DOCKET NO, D96.2.15

DISSENT OF COMMISSIONER ROWE

I concur in much of the analysis in the Commission's order. I dissent to the extent that I would condition withdrawal of Centrex and Digitrex upon approval by the Commission of appropriately-priced substitutes.

I have long had concerns about various pricing schemes for Centrex-type service, which prior to the possibility of Centrex resale had some arguably anti-competitive elements (e.g. tying).¹ With the advent of the possibility of resale, some local exchange carriers developed different concerns and have sought to withdraw these services. Other local companies such as Citizens Tel have decided not to seek withdrawal of these services. Indeed, Citizens introduced its Centrex product to Montana after the U S WEST and PTI requests to withdraw the service were filed.²

Because Centrex-type service is a combination of specific service elements, robust local competition should theoretically allow customers to purchase discrete elements at appropriate prices and combine them to meet their particular needs. However, until vigorous competition develops, Centrex-type services will continue to fill an important need for customers (especially mid-sized businesses) which do not wish to purchase, maintain, upgrade or operate PBX equipment.

PTI witness Otis developed serious pricing concerns about PTI's Digitrex service. According to Otis, pricing is correct today (prices cover costs for the service as currently used), but might not do so if the service were provided more broadly as an alternative to 1FB primary business service. PTI and U S WEST's concern is grounded in the possibility of incorrect pricing and the possible ability of rivals to take inappropriate advantage of that pricing. Both PTI and U S WEST have committed to filing with the Commission substitute services. PTI's filing is now somewhat later than PTI had hoped. U S WEST's substitute filing is now significantly later than had been committed.³

¹ In Docket 92.9.58 the Commission addressed a number of pricing concerns related to U S WEST's Centrex Plus. Most were resolved by the final order.

² Docket D96.10.174, order dated November 25, 1996.

³ In February, 1996, U S WEST stated it would file a substitute within six to nine months. PTI hoped to have its substitute filed by the end of 1996.

MONTANA PUBLIC SERVICE COMMISSION

CERTIFICATE OF SERVICE

* * * * *

I hereby certify that a copy of FINAL ORDER NO. 5905c AND DISSENT OF COMMISSIONER ROWE, in DOCKET NO. D96.2.15, in the matter of USWC AND PTI, dated February 25, 1997, has today been served on all parties listed on the Commission's most recent service list, updated 2/25/97, by mailing a copy thereof to each party by first class mail, postage prepaid.

Date: March 6, 1997



For The Commission

Intervenors

Montana Consumer Counsel
AT&T
Citizens Telecommunications Company
MCI Telecommunications Corporation
Montana Telephone Association
McLeod Telemanagement, Inc.
Ronan Telephone Company

DOCKET D96.2.15

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Service Date: June 25, 1997

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DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
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U S WEST Communications, Inc. to)	
Discontinue Centrex Plus Service,)	UTILITY DIVISION
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IN THE MATTER of the Application of)	
PTI Communications to Discontinue)	ORDER NO. 5905d
Digitrex II Service.)	

ORDER ON MOTION FOR RECONSIDERATION

Introduction and Procedural Background

1. AT&T Communications of the Mountain States, Inc. (AT&T) and MCI Telecommunications Corporation (MCI) filed a Joint Petition for Reconsideration in this Docket on April 7, 1997, asking that the Montana Public Service Commission (Commission) reverse its decision in Order No. 5905c dated February 25, 1997. Order No. 5905c permitted U S WEST Communications, Inc. (U S WEST) to withdraw its Centrex Plus service and permitted PTI Communications (PTI) to withdraw its Digitrex II service (collectively, Centrex). The Commission's Final Order also required U S WEST and PTI to continue offering the services to existing customers, who become grandfathered. Alternatively, if the Commission does not reverse its decision, the Petitioners ask the Commission to vacate its Final Order and direct that an evidentiary hearing with oral argument be held to consider the arguments and evidence presented by them.

2. U S WEST has made filings to withdraw Centrex Plus in all 14 states in its operating region. It has been allowed to do so in Montana and one or two other states; the rest of the states have not permitted U S WEST to withdraw and grandfather the service. Petitioners ask

the Commission to "review the reasoning contained in orders from other states" and hold that U S WEST's and PTI's proposals to withdraw centrex service should be denied for two reasons: (1) because of the anticompetitive effect of the proposals, and (2) because U S WEST and PTI have not provided and cannot provide adequate proof to support their claims of uneconomic arbitrage.

3. Some of the states, while denying withdrawal of Centrex Plus, have other tariff terms and conditions in place which are quite different from U S WEST's Montana tariff, and thus, comparing the Montana filing with these states would be difficult. It is also unnecessary because the record in this case provides sufficient information from which to decide the issue for Montana.

4. In a work session held on May 28, 1997, the Commission voted to deny the Petitioners' Motion for Reconsideration and affirm its original decision.

Commission Decision

5. In their joint Motion for Reconsideration AT&T and MCI assert that the Commission's Final Order relies on legally or factually erroneous or irrelevant findings to support the decision to allow centrex withdrawal. The Petitioners claim the Commission's Final Order is anticompetitive, discriminatory, violates the federal Act, and is inconsistent with the public interest. They raise the following issues in their joint motion for reconsideration: (1) who has the burden of proof to show that the public interest will not be adversely affected by centrex withdrawal; (2) whether the Commission's definition of competition violates the terms of the Telecommunications Act of 1996,¹ the Federal Communications Commission's (FCC) Order and Montana law; (3) whether AT&T was denied due process; (4) whether the Commission's findings are supported by substantial evidence; and (5) whether subsequent events demonstrate that the Commission's Final Order is anticompetitive.

¹Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (amending the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, to be codified as amended in scattered sections of 47 U.S.C.).

A. The burden of proof.

6. AT&T and MCI claim that the Commission's Order rests on an implicit conclusion that they have the burden to prove that withdrawal of centrex services will not adversely affect the public interest. They further claim that the Commission failed to support this conclusion with a reasoned analysis. They argue that U S WEST and PTI bear the burden of proof and must show that the withdrawal of centrex service does not violate the Act or Montana law, and is in the public interest. AT&T and MCI ask the Commission to reconsider the evidence in this proceeding while placing the burden of proof where it belongs. According to AT&T and MCI, U S WEST and PTI have failed to support their request for withdrawal with adequate evidence. As an alternative, the Commission is asked to vacate the Order and reopen the proceedings for full hearing and oral argument.

7. U S WEST responded, stating that because AT&T and MCI initially claimed that withdrawal is anticompetitive, they have the burden of proving their claim under Montana's rules of evidence. Section 26-1-401, MCA, provides that the initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Similarly, § 26-1-401 MCA, states that "a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting."

8. The Order states that centrex withdrawal is not anticompetitive because AT&T and MCI will have the opportunity to sell all retail services, including replacement centrex services, at a wholesale discount, will be able to combine unbundled network elements to create other retail services, can offer facilities-based alternatives to centrex and can resell Centrex Plus and Digitrex II to grandfathered customers. Furthermore, withdrawal of centrex would not negatively affect AT&T and MCI's plans to enter local markets because both have said that entry requires rules on interconnection and unbundling in addition to wholesale rates for resale of services.

9. The burden of proof was properly applied in the Final Order. U S WEST and PTI had the initial burden of producing evidence to demonstrate that withdrawing centrex services is

consistent with the public interest and should be permitted. The public interest includes the policies expressed by the Montana Legislature and set forth in the Montana Telecommunications Act. *See* § 69-3-802, MCA. When U S WEST and PTI established that centrex withdrawal was not inconsistent with the public interest, the burden shifted to the Petitioners to produce evidence to support their claims. Thus, MCI and AT&T had the burden to prove their claim that centrex withdrawal was anticompetitive by a preponderance of the evidence. The Commission concluded that Petitioners did not introduce sufficient evidence to meet that burden, after having been given the opportunity to produce evidence as to why centrex should not be withdrawn.

10. AT&T and MCI further requested that if the Commission did not grant their motion based on the burden of proof argument, it should reopen the record and hold a hearing for further receipt of evidence. The parties stipulated to vacate the hearing that had been scheduled for September 18, 1996, and to submit this matter on a stipulated record for briefing by the parties. As explained in this Order and in the Final Order, the record in this matter supports the Commission decision, without the addition of supplemental evidence. Moreover, AT&T and MCI have not identified any particular additional evidence, other than cost studies AT&T was not permitted to obtain from U S WEST, that they believe should be considered which was not identified prior to the stipulation of the record in this matter or their reasons for not producing such evidence prior to stipulating.

B. The Commission's Final Order does not inappropriately limit local exchange competition to that which is sustainable and efficient.

11. In the Final Order, the Commission stated that the transition to competitive local telecommunications markets should lead to sustainable and efficient competition. AT&T and MCI assert that there is no provision in the Act or Montana law which limits the definition of competition to that which is sustainable and efficient. They argue that without such limiting language, the Commission should construe its authority to encourage competition when and where it can exist, as long as there is no adverse effect on the public interest.

12. The Petitioners assert three reasons to support their argument that the Commission should not limit competition in this manner: (1) It is inconsistent with the Act, because the Act

requires the Commission to allow competition, subject only to competitively neutral universal service and consumer protection provisions; (2) the Commission failed to acknowledge the FCC's concerns about the anticompetitive effects of LEC withdrawals of services; and (3) Montana law requires the Commission to encourage the orderly transition to competition, while maintaining universal service.

13. In carrying out its duty to encourage competition, if the Commission cannot attempt to structure competition in an embryonic market to that which it believes should lead to sustainable and efficient competition, then it must equally encourage competition that is short-lived and inefficient. However, this argument fails because the Commission is charged by the Montana Telecommunications Act with overseeing an orderly transition from a regulated telecommunications market to a competitive one. A transition characterized by an unsustainable period of competition based on inefficiency will not lead to an orderly transition nor will it be in the public interest.

14. AT&T and MCI criticize as illogical the Commission's concern that competition based on centrex resale may quickly benefit some customers but may not lead to sustainable, economic long-term benefits. AT&T and MCI state that there can be no long-term benefits to competition and consumers without first having short-term benefits. But, short-term benefits may be lost over the long-term and competition and consumers may be worse off if emerging markets are not structured in ways that lead to sustainable and efficient competition. As the Commission recognized in the Final Order in this Docket, there is an important difference between protecting or promoting a competitor and encouraging competitive markets. The Commission's role is to facilitate regulatory and market structures that encourage competition in telecommunications markets.

15. Nothing in state or federal law requires the Commission to promote one or several competitors by sacrificing the public interest benefits attributed to efficient competitive markets. Allowing centrex withdrawal is consistent with the public interest because it does not foreclose AT&T and MCI or any other new entrant from entering local telecommunications markets, but

prevents possible uneconomic competition while the Commission considers broader questions concerning overall LEC revenue levels and rate rebalancing.

16. Moreover, the Commission did not fail to acknowledge the FCC's concerns about the anticompetitive effects of local exchange carriers' withdrawals of services. The Commission found that centrex withdrawal, with grandfathering for existing customers, is consistent with the FCC Order as well as the 1996 Act and Montana law, and concluded as follows:

7. The Commission's approval of PTI and U S WEST's applications to withdraw Digitrex II and Centrex Plus, respectively, is not inconsistent with the 1996 Act and FCC regulations adopted on August 8, 1996, to implement the Act, nor does it create a barrier to entry in the Montana telecommunications market. First Report and Order, ¶¶ 965-968.

Final Order, Docket No. D96.2.15, Order No. 5905c, page 19 (Feb. 25, 1997). The Final Order also stated that, "Based on the record in this case it is not clear that centrex service is so essential to the public that regulation must ensure its continued availability." Final Order, at 17-18, ¶ 73. The FCC found that it is up to each state to decide whether a service withdrawal inhibits the development of competition and serves the public interest. However, the law does require that new entrants be allowed to resell a grandfathered service to grandfathered customers. This requirement is met with the Commission's order.

17. Further, the Commission specifically referred to § 253 of the Act, stating that without a thorough evaluation of issues concerning incumbent LECs' present revenues, rate rebalancing and universal service, "permitting broad resale of centrex may unreasonably force LECs to shed market share and revenues and may not be consistent with the competitive neutrality provisions of the 1996 Act." Final Order, at 17, ¶ 70.

C. The Commission did not deny AT&T due process by refusing to grant AT&T's Motion to Compel U S WEST to respond to certain data requests regarding costs studies and subsequently determining that resale of centrex could result in uneconomic arbitrage.

18. The Petitioners claim that their due process rights were violated by basing the decision on issues which would have been addressed with the information AT&T was not permitted to obtain through discovery requests. They argue that the Commission erroneously

concluded that centrex resale "could cause uneconomic bypass," without sufficient information to analyze this issue. The information relates to cost studies that the Commission declined to require from U S WEST, stating that the information requested should be considered in conjunction with a comprehensive review of all of each of the company's services and the underlying network elements and functions used to provide those services.

19. The primary justification for the Commission's decision is that none of the AT&T and MCI objections to withdrawal hold true. The potential for uneconomic arbitrage was not one of the reasons AT&T and MCI objected to the filing.

20. Second, the Commission states at ¶ 66 of its Final Order that "it does not appear that any of the data requests U S WEST was not required to answer would have provided any relevant information about the cost effectiveness of centrex in an environment where it could be resold as basic business service under the current price structure." The issue of uneconomic arbitrage relates to costs that would be incurred to provide centrex beyond its intended use compared to current prices. The data requests U S WEST was not required to answer concern revenues and contribution levels associated with the historical provision of centrex, among other services, and would not have shed any light on the issue of uneconomic arbitrage. The AT&T and MCI Joint Motion does not reference this finding nor does it provide any argument as to why the Commission should reconsider this finding.

21. Third, the Commission readily acknowledged in its Final Order that empirical evidence does not exist in the record to show that the arbitrage would be uneconomic. The Commission added that the revenue requirement and cost of service analyses that would be necessary to make such a showing are beyond the scope of this proceeding.

22. Nevertheless, consideration of potential public interest effects from uneconomic arbitrage is reasonable. Uneconomic arbitrage could cause uneconomic bypass by consumers. Thus, the Commission's uneconomic arbitrage concern is directly related to ensuring that consumers are provided price signals that allow them to make economically efficient service selections. Both competition and the public interest are served by promoting proper price signals. PTI and U S WEST testified that dispersed, single line business usage is beyond the

intended use of centrex service. The concern then is the potential for resellers to offer single-line business service at prices that are too low if the price of the centrex service they are reselling does not reflect the costs of such use and that this ultimately could lead to uneconomic bypass. PTI testified that the cost of providing centrex to dispersed, single-line business customers is five times the cost of providing the service to the typical centrex customer. This testimony was not challenged by AT&T and MCI. Where there is a compelling logical argument that centrex resale may lead to incorrect price signals and there is no argument to the contrary, the absence of empirical evidence does not constitute a valid reason for the Commission to forego caution.

23. The uneconomic arbitrage issue is raised as additional support for allowing centrex withdrawal. However, the decision does not depend on this argument. AT&T and MCI were not denied due process by the Commission's discussion of this concern.

D. The Commission's findings are supported by substantial evidence.

24. The Petitioners argue that the Commission made several findings which are not supported by substantial evidence in the record. These findings are: (1) centrex resale will harm universal service; (2) U S WEST and PTI provided no evidence to support claims of uneconomic arbitrage; (3) centrex withdrawal is not anticompetitive or anti-consumer; and (4) centrex withdrawal will not adversely affect competition or harm the public interest.

25. The Petitioners infer that the Commission based its individual findings and conclusions solely on the basis of one factor, such as the absence of competitors in local markets. These arguments are all related to the ability of the Petitioners to enter the Montana local exchange market swiftly as providers of centrex resale. Their arguments emphasize the potential impact on AT&T and MCI as providers of centrex resale services, rather than focusing on the benefits of competition to consumers and the Commission's duties under both federal and state law, which include managing an orderly transition to competition and ensuring that the public interest is unharmed and the goal of competitive neutrality is achieved.

26. The record does contain substantial evidence to support the Commission's conclusions. Substantial evidence means there is some evidence to support the findings. Substantial evidence is evidence that a reasonable mind might accept as adequate to support a

conclusion; it consists of more than a scintilla of evidence and may be somewhat less than a preponderance of evidence. Martinell v. Montana Power Co., 268 Mont. 292, 319, 886 P.2d 421 (1994). The Commission found the testimony of Ted Otis to be particularly helpful in determining that universal service might be affected by a decision to deny withdrawal of centrex.

E. Subsequent events do not require reconsideration of centrex withdrawal.

27. MCI and AT&T also argue that subsequent events provide additional evidence of the anticompetitive effect of U S WEST and PTI's withdrawal of centrex services. They refer to the issuance of Order No. 5961b in Docket No. D96.11.200, the Commission's arbitration of an interconnection agreement for U S WEST and AT&T, and the recent tariff filings made by PTI and U S WEST which are substitute services for the withdrawn centrex services.

28. MCI and AT&T further argue that the result of the Commission's decision to withdraw centrex service is that they will have to pay more money to provide that service to potential customers, resulting in a price squeeze, and also that it is not clear that the new filings are in fact replacements for the withdrawn services.

29. These subsequent events do not constitute a sufficient reason to reconsider the decision in this Docket. The decision in D96.11.200 is not inconsistent with the Final Order in this Docket and the Final Order did not require that substitute services be made available.

Conclusions of Law

1. The Commission has authority to do all things necessary and convenient in the exercise of its powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

2. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

3. The Commission's approval of PTI and U S WEST's applications to withdraw Digitrex II and Centrex Plus, respectively, is not inconsistent with the 1996 Act and FCC

regulations adopted on August 8, 1996 to implement the Act, nor does it create a barrier to entry in the Montana telecommunications market. First Report and Order, ¶¶ 965-968.

4. Withdrawal of Digitrex II and Centrex Plus is not contrary to Montana law and is consistent with the public interest and Montana public policy as set forth in § 69-3-802, MCA.


Order

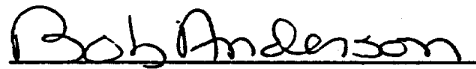
THEREFORE, based on the foregoing, IT IS ORDERED that the Joint Petition for Reconsideration of AT&T and MCI is DENIED.

DONE AND DATED this 10th day of June, 1997, by a vote of 3-2.

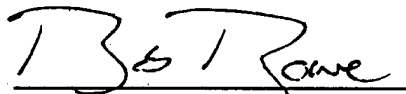
BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION


DAVE FISHER, Chairman


NANCY MCCAFFREE, Vice Chair


BOB ANDERSON, Commissioner
(Voting to Dissent)


DANNY OBERG, Commissioner


BOB ROWE, Commissioner
(Voting to Dissent - attached)

ATTEST:



Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.

ORDER ON MOTION FOR RECONSIDERATION
DOCKET NO. D96.2.15, ORDER NO. 5905d

DISSENT OF COMMISSIONER ROWE

My dissent to the original order explained my view of the positions to be balanced, and suggested that a reasonable approach would be to condition withdrawal of Centrex Plus and Digitrex II on approval of adequate substitute services.

A partial replacement has been filed and approved for U S WEST. The PTI replacement has been filed with the Commission, but issues remain outstanding and it has not been finally approved. In other respects, the Commission's decision appears reasonable.

Respectfully submitted this 10th day of June, 1997.



BOB ROWE, Commissioner

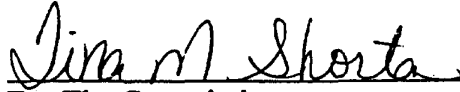
MONTANA PUBLIC SERVICE COMMISSION

CERTIFICATE OF SERVICE

* * * * *

I hereby certify that a copy of ORDER NO. 5905d, ORDER ON MOTION FOR RECONSIDERATION, in DOCKET NO. D96.2.15, in the matter of USWC AND PTI, dated June 10, 1997, has today been served on all parties listed on the Commission's most recent service list, updated 6/3/97, by mailing a copy thereof to each party by first class mail, postage prepaid.

Date: June 24, 1997


For The Commission

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Citizens Telecommunications Company
MCI Telecommunications Corporation
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McLeod Telemanagement, Inc.
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BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of McLeod Telemanage-)	Docket FC-1252
ment, Inc.; MCI Telecommunications,)	Docket FC-1253
Corp. and AT&T Communications of)	Docket FC-1254
the Midwest, Inc.)	
Complainants)	
vs.)	Sustained in Part
)	Denied in Part
US West Communications, Inc.)	
Respondent.)	Entered November 25, 1996

APPEARANCES:

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BY THE COMMISSION:

O P I N I O N S A N D F I N D I N G S

On February 12, 1996, McLeod Telemanagement, Inc. (McLeod) and MCI Telecommunications Corporation (MCI) filed complaints (FC-1252 and FC-1253 respectively) and on March 21, 1996, AT&T Communications of the Midwest, Inc. (AT&T) filed a complaint (FC-1254) objecting to the February 5, 1996, filing by US West Communications (US West) discontinuing its offering of Centrex Plus service in the state of Nebraska and grandfathering existing Centrex Plus customers.

On February 13, 1996, the Commission rejected a motion to hold in abeyance the effective date of US West's Centrex Plus rate list until resolution of the formal complaints filed by MCI and McLeod. US West's rate list became effective February 16, 1996, pursuant to Neb. Rev. Stat Section 86-803(1)(1994).

On April 25, 1996, notice of hearing was sent to all parties. A hearing was held on May 30, 1996, at which time evidence and testimony were adduced. Appearances are as shown.

FC-1252
FC-1253
FC-1254

PAGE TWO

T H E E V I D E N C E

Thomas M. Parvin, testifying on behalf of McLeod, said that US West's filing would make it impossible for McLeod to resell Centrex Plus in Nebraska in the future. He testified that McLeod is not currently certified to provide local service in Nebraska and that McLeod was awaiting action by the Commission in its investigation of local exchange service before making a filing to provide local service. Mr. Parvin testified that McLeod cannot provide facilities-based local service in Nebraska at this time and that there was no current service available from US West that was functionally equivalent to Centrex Plus. Mr. Parvin testified that he believed US West was discontinuing Centrex Plus service in order to prevent resellers from using Centrex Plus as a means to enter local markets. He testified that he believed resale is essential to the development of local service competition in Nebraska and that US West's action would limit job creation and economic development in Nebraska.

Anthony J. DiTirro, MCI, testified that US West's discontinuance of Centrex Plus would have a detrimental impact on MCI's entry into the local market and upon local competition in general. He testified that MCI is not currently certified to provide local service in Nebraska but that MCI is contemplating applying for such authority. Mr. DiTirro testified that he believed US West's actions were contrary to the provisions and policies of the Federal Telecommunications Act of 1996. He testified that he believed competitors' use of Centrex Plus service was technically and economically feasible and that there is no reasonable alternative to Centrex Plus service currently available from US West. Mr. DiTirro further testified that US West's actions were discriminatory and therefore in violation of the Federal Telecommunications Act.

John W. Blake, who appeared on behalf of AT&T, testified that AT&T had filed an application to provide local exchange service in Nebraska, but was unable to say how or when AT&T would actually provide local service in this state. Mr. Blake pointed out that in its application AT&T indicated that it intended to provide local exchange service through a combination of resale of other companies' services and the use of its own facilities. He testified that he believed that resale is extremely important to the development of competition. Mr. Blake also testified that he believed that US West's discontinuance of its Centrex Plus service is anti-competitive and in violation of the Federal Telecommunications Act of 1996.

FC-1252
FC-1253
FC-1254

PAGE THREE

Karen A. Baird, testifying on behalf of US West, described Centrex Plus service as a central office-based switching service offered as an alternative to PBXs for large and medium sized business and government end-user customers. She testified that US WEST discontinued Centrex Plus service for several reasons. First, because Centrex Plus has been priced and structured to compete with PBX's, resellers are able to create an arbitrage situation with US West's business exchange service by purchasing Centrex Plus service and then reselling individual Centrex Plus lines to business customers at a rate below US West's flat rate for a business exchange line (1FB). Second, resellers have been using Centrex Plus to combine long distance traffic from unaffiliated end-users and offering them a 1+ alternative to US West's intraLATA long distance service which gives the resellers' customers the unfair advantage of 1+ dialing without having to contribute to the support of residential service to the extent that other business customers do. Lastly, Centrex Plus has failed to meet the needs of medium and large business and government customers as shown by the fact that in Nebraska, Centrex Plus has only a 9% share of the market as compared to the 91% market share of PBX systems. Ms. Baird testified that since the mid 1970's, US WEST has withdrawn and grandfathered a number of services in Nebraska without objection. She further testified that US West's actions in this case are not anti-competitive since the complainants have other options available to them for developing local exchange service including the new service US West is preparing to take the place of Centrex Plus. Ms. Baird also testified that there is nothing in Nebraska law or in the Telecommunications Act of 1996 which requires US West to continue offering Centrex Plus service to new customers.

D I S C U S S I O N

State Law:

Although complainants have alleged that US West's actions in this case are contrary to Nebraska law, the only statute that they have been able to present to this Commission is Neb. Rev. Stat. Section 86-801 (1994) which is a statement of legislative policy. Because Section 86-801 is a statement of general policy, it neither prohibits nor permits any particular action by a telecommunications company. A statement of general policy may be used to help interpret other parts of a legislative act, but it cannot control or enlarge the power of any governmental body. Therefore, Section 86-801 is insufficient by itself to sustain a finding of any violation of state law.

FC-1252
FC-1253
FC-1254

PAGE FOUR

The complainants have charged that the grandfathering of Centrex Plus service for existing customers is illegal because it is discriminatory. However, in the area of utility service it is not every discrimination by a telephone company or other utility that is objectionable but only such discriminations that are unjust or arbitrary. It has long been recognized that there may be differences between different categories of customers such as between residential and commercial users of utility service. Rutherford v. City of Omaha, 183 Neb. 398, 160 N.W.2d 223 (1968). Moreover, the Nebraska Supreme Court has held that resellers are in a different category from consumers and that different treatment of a reseller by a public utility does not result in unjust discrimination. Cornhusker Electric Co. v. City of Fairbury, 134 Neb. 248, 278 N.W.2d 379 (1938).

Grandfathering is a common and well-accepted practice in the telephone industry. The Wisconsin Public Service defines it as a procedure whereby a service becomes unavailable to new customers but continues to be available for existing customers. Re: Wisconsin Bell, Inc., 120 P.U.R.4th 617, 619 (1990). A number of examples of services that have been grandfathered in Nebraska without objection were cited in the testimony in this case.

The reason for grandfathering is one of fairness. When a service is discontinued, existing customers often do not want the service taken away from them. In order to treat existing customers fairly, they are given a period of time during which they can continue to use the service before they are actually forced to change to a different service. Having been in the position of relying on the service that is now being discontinued, they are considered to be in a different category from those customers who have never signed up or had the service installed for them. For this reason, grandfathering has been considered an equitable way of handling existing customers and has not been viewed as unjust discrimination. This reasoning would appear to be particularly true with regard to Centrex Plus service where the existing customers are large businesses and governmental bodies which use the service to cover multiple locations. It could be extremely disruptive to them if US West were to withdraw Centrex Plus service from them immediately. Accordingly, this Commission does not believe that US West's actions in this case are contrary to Nebraska law.

FC-1252
FC-1253
FC-1254

PAGE FIVE

Filing Requirements:

The complainants have challenged US West's filing procedure in this case and have asserted that US West's withdrawal of Centrex Plus service is subject to Commission Rule 002.21 which requires Commission approval of a tariff filed by an exchange carrier. However, the distinctions between a tariff and a rate list came into existence with the adoption of Neb. Rev. Stat. Section 86-801 to 86-811 in 1986, and US West has been providing Centrex Plus service according to the terms and conditions of a rate list filed under Neb. Rev. Stat. Section 86-803(1). It is the opinion of this Commission that Commission Rule 002.21 does not apply in this case and that US West's filing was appropriate under Nebraska law.

Telecommunications Act of 1996:

In adopting the Telecommunications Act of 1996, Congress delegated general enforcement powers to the Federal Communications Commission (FCC). On August 8, 1996, the FCC issued its First Report and Order, FCC 96-325 (Report), concerning the implementation of that Act. In its Report, the FCC declined to adopt a rule on the subject of the ability of an incumbent local exchange carrier (LEC) to withdraw services where resellers are purchasing such services for resale in competition with the incumbent LEC including that "this is a matter best left to state commissions." Although the FCC did not find that a withdrawal of service is an unreasonable restriction on resale, it did state the following at paragraph 968 of its report:

We find it important, however, to ensure that grandfathered customers -- subscribers to the service being withdrawn who are allowed by an incumbent LEC to continue purchasing services -- not be denied the benefits of competition. We conclude that, when an incumbent LEC grandfathers its own customers of a withdrawn service, such grandfathering should also extend to reseller end users. For the duration of any grandfathering period, all grandfathered customers should have the right to purchase such grandfathered services either directly from the incumbent LEC or indirectly through a reseller. The incumbent LEC shall offer wholesale rates for such grandfathered services to resellers for the purpose of serving grandfathered customers. {Footnote omitted.}

FC-1252
FC-1253
FC-1254

PAGE SIX

This Commission agrees with the statement of the FCC quoted above. Although it may not be unreasonable for an incumbent LEC to withdraw a local exchange service as a public offering and to grandfather existing customers, nevertheless we believe that under the Telecommunications Act of 1996, certificated resellers of local service should be allowed to purchase the grandfathered service from the incumbent LEC at wholesale rates and to offer that service for resale to the grandfathered customers of the incumbent LEC. Therefore, this Commission will direct US West to make Centrex Plus service available to certificated resellers of local service in this state for the duration of the grandfathering period so that such resellers may offer the service on a resale basis to US West's grandfathered Centrex Plus customers.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the complaints of McLeod Telemanagement, Inc., MCI Telecommunications Corporation, and AT&T Communications of the Midwest, Inc. regarding any violation of Nebraska law be, and they are hereby denied.

IT IS FURTHER ORDERED that the complaints of McLeod Telemanagement, Inc., MCI Telecommunications Corporation, and AT&T Communications of the Midwest, Inc. regarding a violation of the Telecommunications Act of 1996 be, and they are hereby sustained, to the extent that for the duration of the grandfathering period US West will be required to allow certificated resellers of local service to purchase Centrex Plus at wholesale rates and to offer Centrex Plus for resale to the grandfathered customers of US West.

MADE AND ENTERED at Lincoln, Nebraska this 25th day of November, 1996.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

//s//Rod Johnson
//s//Frank E. Landis
//s//James F. Munnelly
//s//Daniel G. Urwiller

Chairman

ATTEST:

COMMISSIONER DISSENTING:

[Signature]

Executive Director

[Signature]
[Signature]

FC-1252
FC-1253
FC-1254

PAGE SEVEN

DISSENT OF COMMISSIONER LOWELL C. JOHNSON

I respectfully disagree with the Opinions and Findings expressed by the majority of the Commission in this matter, and the Order approved by a majority vote, on November 25, 1996.

State Law.

I reject the finding that this is a routine case of "grandfathering." US West has testified that it will permit existing customers of Centrex Plus to expand their use of such service, even though other interested customers are being denied the same service. I find such a practice to be contrary to the traditional and customary form of grandfathering, and thus unjust, arbitrary and discriminatory treatment of potential customers. I further find such practice constitutes a violation of Neb. Rev. Stat. § 75-126(1)(b) (1995 Supp.), which states that no common carrier shall make or give any undue or unreasonable preference or advantage to any particular person.

Filing Requirements.

I find that US West's filing procedure is contrary to Commission Rule 002.21 because such filing encompasses terms and conditions of the Centrex Plus service (not just rates). Amendments and changes which affect terms and conditions of a service must be provided for in a tariff, subject to Commission approval under Rule 002.21. Rule 002.21 did not become inoperable when the Legislature permitted rates to be modified by filing a rate list pursuant to Section 86-803(1).

Telecommunications Act of 1996.

The majority's adoption of the procedure required by the FCC at paragraph 968 of its First Report and Order, allowing resale only to the "grandfathered customers of US West," orders US West to do nothing more than comply with an existing legal obligation. The majority relies upon this provision to avoid examining the substantive requirements of the Telecommunications Act of 1996 ("Act") itself.

The Act creates a pro-competitive framework designed to bring competition to local exchange markets. The Act specifically (i) prohibits unreasonable or discriminatory restrictions on resale [47 U.S.C. § 251(b)(1)], (ii) requires wholesale rates for all services offered at retail [47 U.S.C. § 251(c)(4)(A)], and (iii) forbids the erections of barriers to entry into exchange markets [47 U.S.C. § 253]. The evidence before the Commission showed that US West's filing will have the effect of imposing a barrier to the entry of competitors into

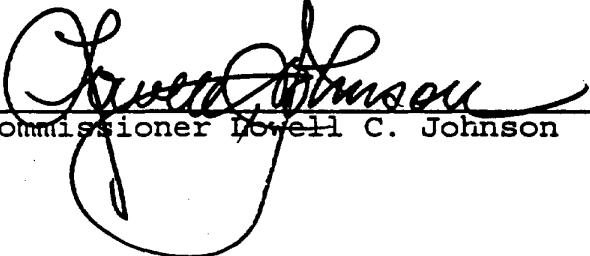
FC-1252
FC-1253
FC-1254

PAGE EIGHT

local exchange markets, in clear violation of 47 U.S.C. §§ 251(b)(1) and 253. Furthermore, the withdrawal of Centrex Plus service as proposed by US West will effectively circumvent the "resale" requirement of the Act, because US West has not offered either a more feature rich competitive product or a functionally equivalent replacement. US West's withdrawal of Centrex Plus, under such circumstances, thus violates 47 U.S.C. § 251(c)(4)(a) as well. Finally, allowing some customers to expand Centrex Plus service, while denying the same Centrex Plus service to other interested customers, is testimony to the fact that Centrex Plus is not truly withdrawn, and serves to emphasize that US West's proposal to "withdraw" or "grandfather" Centrex Plus is unreasonable and discriminatory, a clear violation of 47 U.S.C. § 251(b)(1).

The majority made no findings regarding whether US West's proposed "grandfathering" of Centrex Plus would constitute a violation of the Federal Act's provisions which prohibit discrimination, require wholesale rates for all services offered at retail, and forbid the erection of barriers to entry. While the Act does not require that US West's product line be forever frozen in time, it does require that this Commission examine the withdrawal of a service such as Centrex Plus, and consider whether that withdrawal is anti-competitive, discriminatory, imposes barrier to entry, or is otherwise contrary to law or the public interest. No such determination was made in the opinions and findings entered by the majority of this Commission, contrary to the requirements of the Act.

I find that the Complainants in this matter presented evidence that the US West proposal to withdraw Centrex Plus service is unreasonable, arbitrary, anti-competitive and discriminatory. The formal Complaints of MCI Telecommunications Corporation, AT&T Communications of the Midwest, Inc., and McLeod Telemanagement, Inc. should be sustained.


Commissioner Lowell C. Johnson

Nebraska Public Service Commission

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December 4, 1996

To Interested Parties:

CERTIFICATION

I, Robert R. Logsdon, Executive Director of the Nebraska Public Service Commission, hereby certify that the enclosed is a true and correct copy of the original order made and entered in Formal Complaint No's. 1252, 1253 and 1254 on the 25th day of November, 1996, as the same is filed and recorded in the official records of said Commission.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the Nebraska Public Service Commission, Lincoln, Nebraska, this 5th day of December, 1996.

Please acknowledge receipt of this document in writing.

Sincerely,

A handwritten signature in cursive script that reads "Robert R. Logsdon".

Robert R. Logsdon
Executive Director

RRL:rp

Enclosure

cc: Maria Arias-Chapleau, AT&T Law Dept., 1875 Lawrence St.,
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ROBERT R. LOGSDON